In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 639.

THE LEROY DYAL COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court for the District of New Jersey (R. 77-80) are not reported. The opinion of the Court of Appeals for the Third Circuit (R. 84-90) is reported at 186 F. 2d 460.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on December 28, 1950 (R. 92). The petition for a writ of certiorari was

filed on March 27, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

In 1947, Government support of the price of Irish potatoes at not less than 90% of parity was extended only to those growers who did not plant in excess of the 1947 potato-acreage goals established for their farms. To implement this price support program, Commodity Credit Corporation entered into contracts with various potato dealers, guaranteeing them a market for all potatoes purchased by them at not less than support prices. In return, the dealers agreed to buy potatoes only from those growers who had not exceeded their 1947 acreages. For breach of that agreement, the contract expressly provided that the dealer would pay Commodity Credit Corporation liquidated damages of 3¢ per pound for each pound of potatoes purchased from growers who were ineligible for price support because they had exceeded their 1947 acreages.

The question presented is whether this agreement for liquidated damages, although expressly giving the Government a right to recover in such circumstances, should be denied enforcement on the ground that it constitutes a "penalty".

STATUTORY AND CONTRACTUAL PROVISION INVOLVED.

1. The Steagall Amendment (Sec. 4, Act of July 1, 1941, 55 Stat. 498, as amended by Sec. 9, 56 Stat. 765, 768, 15 U.S.C. 713a-8) provided in pertinent part:

(a) Whenever during the existing emergency the Secretary of Agriculture finds it necessary to encourage the expansion of production of any non-basic agricultural commodity, he shall make public announcement thereof and he shall so use the funds made available under section 3 of this Act or otherwise made available to him for the disposal of agricultural commodities, through a commodity loan, purchase, or other operation, taking into account the total funds available for such purpose for all commodities, so as to support, during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, a price for the producers of any such commodity with respect to which such announcement was made of not less than 90 per centum of the parity or comparable price therefor. The comparable price for any such commodity shall be determined and used by the Secretary for the purposes of this section if the production or consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities. Any such commodity loan, purchase, or other operation which is undertaken shall be continued until the Secretary has given sufficient public announcement to permit the pro-

ducers of such commodity to make a readjustment in the production of the commodity. For the purposes of this section, commodities other than cotton, corn, wheat, tobacco, peanuts, and rice shall be deemed to be non-basic commodities.

2. The entire contract is set forth in the Record at pages 2 to 13. Article 11 of the contract (R. 8-9) provides:

> Article 11. *Liquidated Damages.* In the event Dealer purchases ineligible potatoes or potatoes of an ineligible grower or pays for potatoes less than the applicable support price or fails to comply with directions of CCC to withhold certain potatoes from market, or sells ineligible potatoes belonging to another person or sells potatoes belonging to an ineligible grower, the parties hereto agree, in view of the difficulty of ascertaining the exact damages suffered by CCC as a result of such actions, that such damages shall be $3.00 per hundredweight or fraction thereof of potatoes so purchased or sold and that Dealer will pay said amount to CCC, as compensation and not as a penalty. Inasmuch as payment of $3.00 is not intended to take the place of any obligation of Dealer to refund to CCC any monies which he collected without being entitled thereto, this provision for liquidated damages or payment of such damages shall not preclude or invalidate claims of CCC for such refunds. Neither shall this provision exclude any other relief, at law or in equity, to which

CCC may be entitled apart from its claim for damages.

STATEMENT.

This action arises out of a claim by the United States against petitioner, a dealer in potatoes, for liquidated damages stipulated in a contract under the Irish potato price support program.

1. *The Irish potato price support program.* The background of this suit, although not fully revealed in the transcript, is readily apparent from the official records of the price support program. The basic authority for the program was found in the Steagall Amendment, *supra,* pp. 3-4, which empowered the Secretary of Agriculture (1) to make public announcement of the need for encouraging increased production of potatoes and other so-called non-basic agricultural commodities,[1] and (2) to support a price of not less than 90% of parity for the producers of any commodity as to which such announcement was made.

The need for expanding production of all essential foods to meet the war emergency was recognized early in World War II. Hearings, Subcommittee on Food Shortages of the House Committee on Agriculture, 80th Cong., 1st sess., on Potato Surpluses and Prevention of Wastage, p. 50. Potatoes, particularly, were "regarded as a basic item of diet and essential to proper feeding of the

[1] The statute provided that all commodities "other than cotton, corn, wheat, tobacco, peanuts, and rice shall be deemed to be non-basic commodities." *Supra,* p. 4.

armed forces and the civilian population" *Ibid.* Accordingly, on November 28, 1942, the Secretary, acting under the Steagall Amendment, announced that he found it necessary to encourage production of Irish potatoes beginning with the 1943 crop and that he would support the price at 90% of parity. 7 F. R. 9986; see 9 F. R. 4837. While this increased production was necessary to satisfy the heavy war-time demand, "the potato trouble started seriously the moment victory over Japan was announced. The Army began cutting back orders for both fresh and dehydrated potatoes." Hearings, House Committee on Agriculture, 80th Cong., 1st Sess., on Agricultural Price Support Policy, p. 6. Overproduction in 1945 was followed by a huge surplus of potatoes in 1946. *Ibid.*

Cessation of hostilities did not mean the end of the Government price support program. Under the Steagall Amendment, the Government was compelled to continue to support the price of potatoes for the "two year period" following the date on which the cessation of hostilities was proclaimed. *Supra,* p. 3. Since hostilities were terminated as of December 31, 1946 (12 F. R. 1), price support had to be made available through 1948. This price protection to farmers during that two year period was designed to enable them "to adjust from expanded wartime production to a normal peacetime production." Hearings, House Committee on Agriculture, 80th Cong., 1st Sess., on Agricultural Price Support Policy, p. 13.

In fulfilling its statutory obligation to support the price of potatoes, the Government, in 1946, sustained "a net loss of about $80,000,000." *Id.* at p. 7. By September, 1946, it was apparent that the steadily increasing overproduction would glut the market in 1947 and cause the Government to sustain even greater losses on its price support operations. *Id.* at p. 12.

Limitations on the acreage planted to potatoes was the only effective means of cutting down on the increasing potato crop expected in 1947 and of making possible an orderly transition from wartime to peacetime potato production. *Id.* p. 12-14.[2] Such limitations also were the only means of avoiding increases in losses to the Government in its mandatory price support program. Therefore on September 6, 1946, the Secretary of Agriculture announced that compliance with farm acreage limitations would be a condition of eligibility for the 1947 Irish potato price support program. *Id.* 12. Acreage goals were established for each farm

---

[2] There are "three choices. On one side you have agriculture with no support prices at all. Under existing conditions that means bankruptcy. On the other side you have a support program with no limitation on production. That means bankruptcy for the United States Treasury. There cannot be any doubt about those two extremes. And in the middle is a fair support price program with a reasonable limitation on production, in order that the United States Government might be saved from excessive losses." Hearings, Special Subcommittee of the House Committee on Agriculture, 81st Cong., 1st sess., on H. R. 5751, p. 30.

pursuant to regulations issued by the Secretary on December 20, 1946 (11 F. R. 14661). Those regulations expressly provided that any farmer who planted in excess of the 1947 goal established for his farm would be ineligible to participate in the 1947 potato price support operations. *Ibid.*

On March 13, 1947, the Agriculture Department, stressing the fact that eligibility for price support depends upon compliance with 1947 individual farm potato-acreage goals, authorized assistance by potato dealers, on a contract basis, in its price support program. Hearings, Subcommittee on Food Shortages of the House Committee on Agriculture, 80th Cong., 1st sess., on Potato Surpluses and Prevention of Wastage, p. 70-71.

2. *Petitioner's breach of its contract with Commodity Credit Corporation.* On July 15, 1947, petitioner, a potato dealer, entered into a "Dealer Agreement" with Commodity Credit Corporation, agreeing "to assist the Secretary in carrying out the mandate of Congress under the Steagall Amendment." (R. 2, 3.) In the contract, petitioner agreed to buy potatoes only from eligible vendors[3] at no less than the established support price. Commodity Credit Corporation, in turn, agreed to purchase from the dealer any eligible

[3] Eligible vendors were defined as (1) growers who had been certified as having stayed within their acreage goals; (2) dealers who executed a "Dealer Agreement"; and (3) others specifically approved by Commodity Credit Corporation (R. 3).

potatoes which the dealer could not market in commercial channels at the current support prices (R. 5, 7).

The dealer was thereby guaranteed a market for all potatoes purchased by it in compliance with the contract (R. 24). If the dealer violated the contract by purchasing ineligible potatoes or potatoes from an ineligible grower, it was agreed in Article 11 that "in view of the difficulty of ascertaining the exact damages suffered by CCC as a result of such actions, that such damages shall be $3.00 per hundredweight or fraction thereof of potatoes so purchased or sold and that Dealer will pay said amount to CCC, as compensation and not as a penalty" (R. 9, *supra,* p. 4). Either party to the contract could cancel the agreement "at any time by giving 30 days notice in writing" (R. 9).

In August and September of 1947, shortly after the "Dealer Agreement" was executed, petitioner violated it by purchasing 367,400 pounds of Irish potatoes from one Raymond Wright (R. 21, 63-65, 78). Wright was not an eligible grower, having planted in excess of his alloted 1947 acreage (R. 21-22, 78). Petitioner claimed that it had bought the potatoes on Mrs. Wright's representation that her husband was an eligible grower (R. 64-65). However, the information that Wright was in fact ineligible was "readily available" to petitioner (R. 85); there was no doubt that the Government had mailed to petitioner a copy of the list of eligible growers and that Wright's name was not on

that list (R. 36-37). Petitioner conceded receiving that list (R. 57).

The potatoes purchased by petitioner from Wright were "U. S. Commercial" potatoes, as to which there was no support price (R. 38). The only grades of potatoes for which there was a support price were "U. S. No. 1, U. S. Size B * * * and U. S. No. 2" (R. 40). The "U. S. Commercial" Grade is not a basic classification in itself but is simply a composition of U. S. No. 1 and U. S. No. 2 grades.[4] The purchase and sale of the "U. S. Commercial" potatoes in the open market affected the price support program, since the sale of U. S. Commercial potatoes reduced the market for the other eligible grades (R. 44).

All of the potatoes purchased by petitioner from Wright were sold by it in normal commercial channels and none of them were sold to Commodity Credit Corporation (R. 66-70, 78). Petitioner, both prior and subsequent to the sale of the Wright potatoes, requested Commodity to purchase several other large quantities of Irish potatoes, amounting to 62,513 100-pound bags, which it could not dis-

---

[4] The requirements for grades "U. S. No. 1" and "U. S. Commercial" are similar except that for "U. S. No. 1" the tolerance for defects is not more than six per cent of the potatoes in any one container and for "U. S. Commercial", the tolerance is not more than twenty per cent. (12 F. R. 3651-3652). "U. S. Commercial" potatoes thus contain at least eighty per cent that meet the quality requirements of "U. S. No. 1" and can "be made a U. S. 1 lots of times by regrading" (R. 60).

pose of at the support price in normal commercial channels (R. 23, 24, 26-32). Fulfilling its contractual commitment, Commodity purchased these potatoes and paid petitioner $145,855.62 (R. 24, 32, 75). Included in this purchase by Commodity was a quantity of potatoes equal to the 367,400 pounds of potatoes which petitioner could have sold in normal commercial channels had it not utilized those channels for the sale of the ineligiblt potatoes it had purchased from Wright (R. 24-25). Thus, by its "breach of contract" in purchasing from Wright, petitioner was enabled to receive payments from Commodity for potatoes "which [petitioner] could have * * * sold in commercial channels except for [its] purchases from Mr. Wright" (R. 24-25). Petitioner's purchase of ineligible potatoes "also furnished to an ineligible producer a marketing outlet, which was unauthorized under the 1947 Price Support Program. Other producers were thereby encouraged to disregard acreage goals with the resulting increase in potato production, and otherwise to remain outside of the price support program, so that the sale of Irish potatoes in commercial channels and the purchase by Commodity Credit Corporation of eligible potatoes from eligible producers was increased accordingly" (R. 25-26).

3. *Proceedings below.* On January 3, 1950, the United States filed its complaint in the United States District Court for the District of New Jersey to recover liquidated damages for petitioner's

breach of contract. Damages in the sum of $11,-022, computed in accordance with Article 11 of the contract (*supra,* p. 4), at $3.00 per cwt. on the 3674 cwt. pounds of potatoes bought from Wright, were demanded (R. 1-2).

Petitioner's answer admitted execution of the contract with Commodity but denied liability for liquidated damages, contending in separate defenses that the United States "suffered no damage as a result of the alleged breach of contract", and that the stipulation of the contract calling for the payment of liquidated damages was a penalty and, therefore, unenforceable (R. 18). After the trial, at which the circumstances set forth above with respect to petitioner's breach of contract were described, the district court entered its findings of fact and conclusions of law (R. 77-80). The court ruled that petitioner's purchase of 367,400 pounds of potatoes from Wright constituted a breach of its contract with Commodity (R. 80). But the court, finding (1) that there was "no proof of any actual damage" suffered by the United States as a result of the breach and (2) that Article 11 of the contract is unenforceable in that "it is in the nature of a penalty", awarded the United States nominal judgment for 6¢ (R. 79, 80, 81).

On appeal, the Court of Appeals for the Third Circuit reversed (R. 90). Pointing out that the absence of proof of actual damage suffered by the United States was not controlling, the court below decided that Article 11 was enforceable as a liquidated damage provision "within the limits set" by

Priebe & Sons v. *United States*, 332
(R. 87).

ARGUMENT.

This case does not present any novel
law calling for authoritative determinati
Court. The validity and enforceability
dated damage" provisions, which are fair
sonable attempts to fix just compensatio
anticipated damage which might result fro
of contract, is no longer open to question.
Sons v. *United States*, 332 U. S. 407, 411
United States, 249 U. S. 361, 365. Su
sions, this Court has stated, "serve a pa
useful function when damages are unc
nature or amount or are unmeasurable,
case in many government contracts."
Sons v. *United States, supra*, p. 411;
United States, supra, p. 366; *United*
Bethlehem Steel Co., 205 U. S. 105, 121.

1. Petitioner, recognizing these princi
parently does not challenge the holding
court below that the nature of the governm
tract here involved is such as to make it
ingly difficult" to predict the exact damag
might result from a breach (R. 90).[5] P

el issues of
ation by this
y of "liqui-
air and rea-
ion for the
rom breach
n. *Priebe &*
11; *Wise* v.
Such provi-
particularly
ncertain in
le, as is the
Priebe &
1; *Wise* v.
d States v.
21.

inciples, ap-
ding by the
rnment con-
it "exceed-
nages which
Petitioner

g Commodity's
rations, stated
ise" and that
ss figures very
n Agriculture,
upport Policy,

[5] The Secretary of Agriculture, in discussing C
prospective losses on 1947 price support operati
"that our estimates at best cannot be precise"
"weather alone could change the stock and loss fi
materially." Hearings, House Committee on A
80th Cong., 1st sess., on Agricultural Price Supp
pp. 2, 3.

does, however, attack the judgment below on the ground that the $3.00 per hundredweight liquidated damage figure was exorbitant and disproportionate to any possible actual damage. In large part this argument is based on a comparison between the $3.00 amount and the 5¢ per hundredweight profit which petitioner asserts it earned on the potatoes it handled, so that $3.00 represented an amount sixty times "the earnings [petitioner] stood to make from the transaction" (Pet. 9). Petitioner therefore would measure the validity of the liquidated damage provision by its reasonableness in relation to the profit it made on the ineligible potatoes bought and sold in violation of the contract. But liquidated damage provisions obviously can be deemed exorbitant only where the amounts fixed are entirely disproportionate to the damage which might result to "*the innocent party,*" not to the party breaching the contract. See *Anaheim C. F. Ass'n* v. *Yeoman,* 51 Cal. App. 759, 761; *Wise* v. *United States, supra,* p. 366; *United States* v. *Bethlehem Steel Company, supra,* p. 121; *Sun Printing and Publishing Association* v. *Moore* 183 U. S. 642, 672-674.

When measured in light of the possible damages to Commodity, the innocent party, it is clear that the $3.00 figure was altogether reasonable and not exorbitant in any way. The record shows that the support price for potatoes which the Government had to pay on potatoes it purchased from petitioner ranged as high as $2.65 per hundredweight

(R. 31), and that at least some of these purchases had to be undertaken by the Government as a result of petitioner's breach of contract (R. 25, *supra* p. ...).[6]

As observed by the court below, while the rate per hundredweight "sometimes * * * dropped down to $1.12½", most of the payments made to petitioner by the Government "were for $2.45 or more per hundredweight" (R. 90). In these circumstances, there can be no doubt the $3.00 "amount is close enough to the general price range" to take any excessive or disproportionate dame "element out of the case" (R. 90).[7]

Rodgers v. *United States,* 332 U. S. 371, relied upon by petitioner (Pet. 12-15), requires no different result. That case simply held that the Gov-

---

[6] The fact that the breach involved in this case, "U. S. Commercial" potatoes is immaterial, since those potatoes, just as the potatoes for which a support price existed, prevented the dealer from selling an equal number of eligible potatoes in the normal commercial channels. *Supra,* p. 10. Cf. *Wickard* v. *Filburn,* 317 U. S. 111, 128-129. Moreover, while no direct support prices existed for "U. S. Commercial" potatoes, these potatoes, as has been noted (*supra,* p. 10), consisted of various specified grades as to which there were support prices. Consequently, "U. S. Commercial" potatoes were entitled to price support on their segregation into the specified grades.

[7] In this connection it is significant that many of the potatoes purchased by the Government in its price-support operations had to be dumped, donated for school lunch programs, or sold at prices which made it possible for the Government to realize only a nominal selling price. Hearings, Subcommittee on Food Shortage of the House Committee on Agriculture, 80th Cong., 1st sess., on Potato Surpluses and Prevention of Wastage, pp. 121, 131, 132.

ernment may not recover interest on statutory penalties incurred under the Agricultural Adjustment Act for marketing cotton in excess of the quotas fixed under the Act and is not relevant to the issue here, i. e., the reasonableness of a contractual agreement estimating the damages recoverable by the United States in the event of breach. The fact that a liquidated damage provision, like a true penalty, may insure and encourage compliance in no way adversely affects its validity. All provisions for damages "are, of course, deterrents of default." *Priebe & Sons* v. *United States*, 332 U. S. 407, 413.[8]

The court below decided this case within the framework of the *Priebe* rule, which it accepted and applied to the particular facts and circumstances here involved. Consequently, the review sought by the petition for certiorari is, essentially, a re-examination by this Court of the factual inferences drawn by the Court below. This, we submit, is not an appropriate basis for further review.

---

[8] Nor, as the court below pointed out, does the absence of proof of actual damages require a holding that the provision in question is a penalty (R. 87). This Court has regularly allowed recovery of "liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained." *United States* v. *Bethlehem Steel Company, supra*, p. 119; *Sun Printing and Publishing Association* v. *Moore, supra*, p. 661; *Robinson* v. *United States*, 261 U. S. 486, 489. In any event it is appropriate to note that the actual losses sustained by the Government from all purchases of surplus potatoes in 1947 averaged $2.61 cwt. Hearings, Subcommittee of the Senate Committee on Agriculture and Forestry, 81st Cong., 1st sess., on S. 2482 and S. 1751, p. 72.

2. Petitioner also contends that the $3.00 liquidated damage provision is invalid because it applies to "a large number of defaults of widely varying character and effect," some of which it characterizes as "most trivial breaches" while admitting that others "might be called substantial" (Pet. 15, 16). The short and conclusive answer to this argument is that the type of breach here involved—petitioner's purchase of potatoes from an ineligible grower, forcing Commodity to buy at support prices from petitioner an equivalent amount of potatoes which petitioner could otherwise have disposed of in normal commercial outlets—results, at the least, in substantial monetary damages to the Government closely approximating the $3.00 figure agreed to by petitioner and Commodity. See *supra*, pp. 14-15.

Moreover, the six specific breaches, for which liquidated damages were made available, actually were closely interrelated and did not vary materially in effect. All six provisions guarded against flooding the market with potatoes which would depress the normal market price below the support price and therefore compel the Government to purchase potatoes at the full support price. Thus, four of the defaults were concerned with the dealer's purchase or sale of ineligible potatoes or potatoes of an eligible grower. Any such default, in addition to disrupting the planned acreage program, would, as was true in the instant case, compel the Government to purchase from the dealers an equivalent amount of eligible potatoes which

the dealers would otherwise have been able to market in normal channels. Similarly, the fifth breach—failure to withhold potatoes from the market at the Government's request—would glut the market, depress the price, and cause additional Government purchases. Finally, the sixth breach —the dealer's purchase of potatoes at less than the support price—would again force downward the normal market price and, in the same manner as the other five breaches, adversely affect the price support program.

3. Petitioner urges that the question presented is vital because "hundreds of substantially identical agreements" were entered into between the Commodity and potato dealers (Pet. 19). But, despite these "hundreds," it is significant that there is only one case now in litigation, in addition to the instant one, which involves the liquidated damage provision here involved.[9] In this connection, it also must be noted that while price support was made available, to a limited extent, as to the 1950 crop of Irish potatoes, Congress has prohibited such support for crops in 1951 and thereafter unless marketing quotas are in effect. Secs. 4 and 5, Public Law 471, 81st Cong., 2d sess. Not only are there no such quotas now in effect, but there is no statute under which they could be established at the present time. Sen. Rep. 1276, 81st Cong., 2d sess.

---

[9] See *United States* v. *Tice, t/a Deerfield Produce and Supply Company*, (D. N. J., No. 392-50).

CONCLUSION.

The decision below is correct. There is no conflict of decisions, and no question of law which is novel or of general importance is presented. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

April 1951.

☆ U.S. GOVERNMENT PRINTING OFFICE 1951—942335/P.O. 762